

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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Date Issued: May 20, 2003

**BALCA Case No.:** **2002-INA-200**  
**ETA Case No.:** P2000-AZ-09472923/JS

*In the Matter of:*

**NISHMA, LLC,**  
**d/b/a SELECT CLEANERS,**  
*Employer,*

*on behalf of*

**KAMLESH KAKAD,**  
*Alien.*

Appearance: Robynn L. Mocek-Allveri, Esquire  
c/o Robynn L. Mocek, P.C.  
Phoenix, AZ

Certifying Officer: Martin Rios  
San Francisco, CA

Before: Burke, Chapman and Vittone  
Administrative Law Judges

**DECISION AND ORDER**

**PER CURIAM.** This case arose from an application for labor certification on behalf of Kamlesh Kakad ("Alien") filed by Nishma, LLC, d/b/a Select Cleaners ("Employer") pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, San Francisco, California, denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26.

Under section 212(a)(5), an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and Attorney General that: 1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and 2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

### **STATEMENT OF THE CASE**

On January 14, 1998, the Employer, Nishma, LLC, d/b/a Select Cleaners, filed an application for labor certification to enable the Alien, Kamlesh Kakad, to fill the position of Supervisor, Dry Cleaner. (AF 88). The job duties for the position, as stated on the application, are as follows:

Supervises and coordinates activities of workers engaged in dry cleaning and pressing wearing apparel and other items. Determines standards and rates of production in accordance with company policy, type of equipment, and work load. Assigns duties to workers to ensure completion of work orders in a manner consistent with

representations to customers. Observes progress of work for training in identifying stains in a variety of fabrics, and in the application of chemicals or other spotting techniques to remove stains. Confers with workers to resolve problems, complaints, and grievances. Handles customer complaints. Reviews production and accounting records to determine cost levels of operation. Records cash receipts and articles received and delivered.

(AF 88, Item 13). The primary requirement for the position is four years experience in the job offered or in the Related Occupation of "Dry Cleaner Manager or Supervisor." (AF 88, Item 14). In addition, the Employer set forth the following Other Special Requirement: "Knowledge and experience in the cleaning of fur, leather, and suede clothing." (AF 88, Item 15).

In a Notice of Findings ("NOF") issued on November 19, 2001, the CO proposed to deny certification on the grounds, *inter alia*, that the Employer had rejected a U.S. worker [Frederick Falek] for other than lawful, job-related reasons (AF 82-85). On or about December 17, 2002, the Employer submitted its rebuttal (AF 21-81). The CO found the rebuttal unpersuasive regarding the above-stated deficiency and issued a Final Determination, dated April 2, 2002, denying certification on the above grounds (AF 19-20). On or about May 2, 2002, the Employer filed a request for review of the Final Determination (AF 1-18). Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals.

## **DISCUSSION**

Under 20 C.F.R. §656.21(b)(6), an employer must document that U.S. applicants were rejected solely for lawful job-related reasons. Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications.

Although the regulations do not explicitly state a “good faith” requirement in regard to post-filing recruitment, such good faith requirement is implicit. *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by an employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are “able, willing, qualified and available” to perform the work. 20 C.F.R. §656.1.

In the report of recruitment results (AF 106-107), dated December 9, 1999, Employer’s President, Mahendra Kanabar, set forth the following basis for not hiring U.S. applicant Frederick Falek:

Mahendra Kanabar, President, interviewed Mr. Falek. His resume generally fit our requirements; however, he was not familiar with DF 2000, and his required salary range (as noted on his resume and in our interview) is well over the proffered salary range for the position advertised. He also wanted a company car, gas and maintenance for the car, and benefits. None of these fit in with our position.

(AF 106).

In the NOF (AF 82-85), the CO stated that the Employer had failed to document that the U.S. applicant [Frederick Falek] was rejected solely for lawful, job-related reasons for rejecting a U.S. applicant, as required in 20 C.F.R. §656.21(b)(6). The CO stated, in pertinent part:

Frederick Falek: The employer states that he was reject[ed] because he was not familiar with DF 2000, his required salary range as noted on his resume was above what the company offered, and because he also wanted a company car, gas and maintenance for the car, and benefits.

However, the Employer had not disclosed any requirement for DF 2000. Regarding the salary and benefits, that he indicated preferences did [not] mean that he would have turned the instant position down if it had been offered to him. Where the employer has disqualified him first for lack of an undisclosed requirement, it does not appear that he was offered the job or that he turned it down.

Corrective action:

Submit rebuttal which documents how each U.S. worker named above has been rejected solely for lawful, job-related reasons.

(AF 83).

The Employer's rebuttal regarding the above-stated issue includes the following: a letter, dated December 17, 2001, signed by Employer's attorney (AF 25-26), as well as copies of the report of recruitment, dated December 9, 1999 (AF 28-29); Frederick Falek's resume (AF 30); and an unsigned, handwritten "Employment Agreement," dated December 6, 1999, which has a handwritten notation of "Fred conditions." (AF 31).

In the rebuttal letter, dated December 17, 2001, Employer's counsel stated, in pertinent part:

Mr. Falek was interviewed by the petitioner on 11-10-99. Although he was interested in the job, salary requirements were too high and he also required benefits that were not offered by the petitioner. The Department should have a copy of the recruitment results report verifying the above information, as well as Mr. Falek's resume and the "Employment Agreement" he drafted and submitted to the petitioner. As you will see, Mr. Falek's requirements for compensation and benefits were well in excess of

those offered by the petitioner.

I personally spoke to Mr. Falek by phone on 12-13-01. Our conversation lasted from approximately 10:20 am until 10:30 am. I wanted to verify if he had indeed been interviewed, and whether he had rejected the offered position. He indicated to me that he had been mildly interested in the job, and had an in-person interview at the petitioner's place of business. He added that he and the petitioner could not reach a "meeting of the minds" as far as compensation and benefits, as Mr. Falek had a firm request of \$850.00 per week (plus benefits). He asked me if I had received a copy of the employment agreement that he himself had drafted, to which I replied in the affirmative. He assured me that the petitioner's representative, Mahendra Kanabar, had been "more than fair" when interviewing him. He concluded by "wishing Mr. Kanabar well" and again verified that he had rejected the offered position and had accepted a position elsewhere.

Mr. Falek did not protest the requirement of being familiar with the DF 2000 machine. It is clear from the posted notice and advertisements that the candidate must know how to train others in the use of "dry cleaning machines." The DF 2000 was not specifically listed, but the candidates were put on notice that they needed to be familiar with all machines at the petitioner's place of business. If every dry cleaning machine used by the petitioner had been listed, the cost of the advertisements would have been prohibitive. Again, Mr. Falek indicated that he had rejected the job and did not feel that he was the victim of an unfair undisclosed job requirement.

(AF 25-26).

The relevant text of the report of recruitment results has already been outlined above. (AF 28-

29, 106-107). Regarding the other rebuttal-related documents, we note that Mr. Falek's resume clearly establishes that he had 16 years experience as owner-manager of various dry cleaning establishments. In addition, Mr. Falek's resume states: "Salary in the 35k-45k range required." (AF 30). Finally, the unsigned "Employment Agreement" form, which Employer's counsel stated was prepared by Mr. Falek, sets forth a salary of \$850 per week, as well as paid holidays, an automobile plus expenses to be paid by the Employer, sick days, and health insurance within 90 days. (AF 31).

In the Final Determination, the CO found the Employer's rebuttal unpersuasive. (AF 19-20). After summarizing the NOF and rebuttal, the CO stated, in pertinent part:

Where the attorney's rebuttal diverges from the original report is mainly in including interpretation that had not been in the original recruitment report, i.e., that the applicant did feel the interview was fair and what he did not feel. However, the U.S. worker, Mr. Falek, had been interviewed by the employer two years prior to the issuance of the Notice of Findings and the subsequent telephone call to him by the attorney for the labor certification application. The employer, whose report was contemporaneous with the recruitment, was also the one who conducted the interview. The statement made to the attorney for the labor certification more than two years later cannot be considered to be more salient as to the facts than the original report of the interview, if there was a contradiction.

Mr. Falek had applied for the labor certification job with the salary and requirements that had been listed. It remains that he was never offered the job and did not actually turn it down at the stated salary, because, objectively, it remains that the employer had disqualified him for lack of experience with the DF 2000 machine, whether Mr. Falek felt that was so or not. Where the attorney states that the cost of listing all of the employer's machines would have been prohibitive, in fact, if experience in each and every one was required, they should have been listed as special requirements. If

the employer had disclosed such brand and model number [as] specific requirements, the Department of Labor would have had the opportunity to question the requirements as to whether or not the specificity of those requirements was unduly restrictive. However, whereas the U.S. worker was rejected for lacking an undisclosed experience requirement, the Department never had the opportunity to question the requirement.

(AF 20). We agree.

It is well settled that an employer generally may not reject a U.S. worker based upon an unstated job requirement. Accordingly, rejection of U.S. applicants for other than a stated job requirement has been found to be unlawful and grounds for denial. *See, e.g., Our Lady of Solace Sch.*, 1993-INA-5 (Dec. 7, 1993)(teaching certificate and experience in religious instruction not listed); *Custom Interiors*, 1992-INA-242 (May 3, 1993)(experience in upholstering French period furniture not stated); *Expert Auto Body Ctr.*, 1995-INA-39 (Oct. 3, 1996)(experience using a particular framework machine was an unspecified requirement).

As outlined above, the only *stated* job requirements are: 4 years of experience in the job offered or in the related occupation of “Dry Cleaner Manager or Supervisor;” and knowledge and experience in cleaning fur, leather, and suede clothing. (AF 88). Mr. Falek’s resume clearly indicates that he exceeded the four-year experience requirement. (AF 30). Furthermore, the Employer apparently was satisfied with Mr. Falek’s knowledge and experience in cleaning in the specialized areas cited as “Other Special Requirements,” since the absence of such experience was not cited by the Employer as a basis for rejecting the U.S. applicant. To the contrary, the only basis cited by Employer for rejecting U.S. applicant Falek was his alleged lack of familiarity with the DF 2000, which apparently is a particular type of dry cleaning machine used by the Employer. (AF 106, 26).

Since familiarity with the DF 2000 is an unstated requirement, we find that it was unlawful

for the Employer to reject the U.S. applicant on that basis. Furthermore, the assertion by Employer's counsel that it would have been prohibitively expensive to list all the dry cleaning machines in the advertisement is unpersuasive (AF 26). If the Employer considered "familiarity with the DF 2000," and/or other machines to be so important as to be the basis for rejecting an otherwise qualified U.S. applicant, the Employer should have listed such requirement(s) on the ETA 750 A form and in its advertisement.

As stated above, the Employer provided an alternative basis for not hiring Mr. Falek; namely, that the U.S. applicant had rejected the job because the salary was too low, and a company car and other benefits were not included. (AF 26,28,106). Having carefully reviewed the Appeal File, we find that the evidence presented does indicate that the U.S. applicant wanted more money (and benefits) than the stated wage rate of \$15.20/hr. (AF 88). The annual salary offered for the position was \$31,616 (*i.e.*, \$15.20/hr. x 40 hours x 52 weeks). In contrast, the U.S. applicant apparently sought a salary of "35k-45k" (AF 30) or \$850/week plus benefits. (AF 31). Therefore, it is quite possible that if the U.S. applicant had been offered the job by the Employer, the U.S. applicant would have turned it down. However, we agree with the CO's determination that the credible evidence fails to establish that Mr. Falek was ever offered the position. (AF 20).

As stated by the CO, the recruitment report by Employer's President, who interviewed the U.S. applicant in 1999, is more contemporaneous and probative than Employer counsel's statement on rebuttal two years later. (AF 20,25-26,106). Although Employer's President noted the U.S. applicant's desire for a higher salary and benefits, he did not specify that the job was offered to Mr. Falek and rejected. Moreover, Employer's President's initial statement is that, even though the U.S. applicant generally meets the requirements, he "was not familiar with DF 2000." (AF 106). Furthermore, there is an inherent contradiction in Employer's position. On the one hand, the Employer states that the U.S. applicant is not qualified for the position because he lacks familiarity with the DF 2000 machine. On the other hand, Employer now asserts that the job was offered to the allegedly unqualified candidate, but that he rejected the job offer.

The Board has consistently held that where a qualified applicant expresses a desire for a higher salary, the employer must actually offer the applicant the position and allow the applicant the opportunity to reject the offer. Accordingly, an employer's mere belief that an applicant would be unwilling to accept the salary is an insufficient basis for rejecting the applicant. *See, e.g., Impell Corp.*, 1988-INA-298 (May 31, 1989)(*en banc*); *Palacio Metal Works*, 1990-INA-396 (Mar. 27, 1991); *Kaprielian Enter.*, 1993-INA-193 (June 13, 1994).

In summary, the Employer rejected Mr. Falek, a qualified U.S. worker, based upon an unstated job requirement; and Employer failed to establish that it offered the job to Mr. Falek or given him the opportunity to reject the offer. Accordingly, we find that labor certification was properly denied.

### **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

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Todd R. Smyth  
Secretary to the Board of  
Alien Labor Certification Appeals

**NOTICE OF PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its

decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.